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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. 520

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF FOR RESPONDENT

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Dated: San Francisco, California,
April 15, 1931.

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No. 520

LEWIS-SIMAS-JONES COMPANY,
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BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT.

Under the title "Statement of the Case", petitioner sets forth in its brief (pp. 1-3) what is apparently intended to be a summary of the essential facts of this proceeding. A very similar statement of the facts appears in the brief of Amicus Curiae (pp. 8-12). Neither of these statements is complete or wholly accurate. The statement appearing in the opinion of the lower appellate court (R., 46, 47) is, however,

correct and complete, and recites the essential facts quite accurately.

As appears from that opinion, and from the findings made by the trial court (R., 38-43), petitioner, at San Francisco, received from respondent during 1923, three carload shipments of cow peas which had been transported by rail from Navojoa, Sonora, Mexico, over the line of the Southern Pacific Railroad Company of Mexico to the international boundary line at Nogales, Arizona, and thence over respondent's line to San Francisco. These shipments moved under through bills of lading, executed by the Mexican carrier and duly issued at Navojoa to the several shippers. The transportation charges, which were collected by respondent from petitioner, at San Francisco, were based upon an international joint through rate of $1.33 per 100 pounds, participated in by the Mexican carrier and the respondent jointly, and named in tariffs filed with the Department of Communications and Public Works of Mexico, and with the Interstate Commerce Commission (R. 40).

In 1924, some time after the delivery of the shipments and the payment of the charges, petitioner filed a complaint with the Commission, alleging that the $1.33-rate assessed, and the charges collected thereunder, had been unreasonable, in violation of Section 1 of the Interstate Commerce Act. That allegation was denied, by answer duly filed with the Commission by the respondent as defendant. In due course,

the Commission rendered its opinion and order, in which it overruled respondent's motion for dismissal of the complaint for lack of jurisdiction, and found and declared that the rate complained of had been unreasonable, and that petitioner had been damaged by its collection; and ordered respondent to pay reparation in the amount of the difference between the charges collected, and those which would have accrued under a rate deemed by the Commission to have been reasonable. The Commission's decision is reported as:

Lewis-Simas-Jones Co. v. S. P. Co. (1925), 102 I. C. C. 45;

and a copy thereof is annexed to the complaint before the trial court (R., 3-5).

Respondent declined to comply with the Commission's order, whereupon petitioner brought suit in the Superior Court of the State of California, as contemplated by Section 16 of the Interstate Commerce Act. The defense raised was that the Commission's order was void, because in excess of the jurisdiction conferred upon it by the Act. In support of that defense respondent proved, and the trial court found, that at all times during which the shipments moved respondent had published and maintained a rate, applicable to that part of the transportation of petitioner's shipments which took place within the United States (i. e., from the international boundary line at Nogales to San Francisco), which was neither alleged, nor proved, nor found, in the proceeding before the

Commission, to have been unreasonable, and which was in fact at all such times reasonable and lawful (R., 41, 42). The trial court concluded, upon the basis of the facts proved, that the Commission's order was void for lack of jurisdiction, and rendered judgment for the respondent. Upon appeal, the judgment was affirmed by the District Court of Appeal of California in:

Lewis-Simas-Jones Co. v. S. P. Co. (1930), ... Cal. App. .....; 289 Pac. 643;

(R., 46-51). That decision was sustained by the Supreme Court of California, through refusal to grant petitioner a hearing of the cause after denial of rehearing by the Appellate Court (R., 51).

STATUTES RELIED UPON.

The relevant portions of the statutes relied upon are set forth in the Appendix to this brief. They consist of Section 1, paragraph 1, of the Act to Regulate Commerce, as it existed prior to 1920 (36 Stat. L. 544); and paragraphs 1 and 2 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920 (49 U. S. C. 1, paras. 1, 2; 41 Stat. L. 474).

SUMMARY OF ARGUMENT.

1. The decision of the District Court of Appeal is squarely in accord with the controlling pronounce-

ments of this Court in *News Syndicate Co. v. N. Y. C. R. R. Co.*, 275 U. S. 179.

2. The respondent complied with its duty under the Interstate Commerce Act, as construed by this Court in the *News Syndicate Case*, in that it maintained a reasonable rate applicable to that part of the transportation of petitioner's shipments which took place within the United States.

3. Respondent, having complied with its duty under the Act to maintain a reasonable rate applicable to the transportation service performed within the United States, committed no violation in collecting charges based upon the international through rate.

4. Various decisions of the Interstate Commerce Commission cited and relied upon by petitioner and Amicus Curiae are of no value as precedents supporting the exercise of the jurisdiction here asserted.

5. Affirmance of the decision here under review will not hamper the exercise by the Interstate Commerce Commission of the jurisdiction, conferred upon it by law, to control rates and charges of United States carriers participating in traffic moving to or from adjacent foreign countries.

6. The transportation of petitioner's shipments was performed pursuant to contracts entered into between the Mexican carrier and the consignors, which contracts are binding upon petitioner.

7. Further reply to certain contentions advanced in brief of Amicus Curiae.

ARGUMENT.

1. THE DECISION OF THE DISTRICT COURT OF APPEAL IS SQUARELY IN ACCORD WITH THE CONTROLLING PRONOUNCEMENTS OF THIS COURT IN NEWS SYNDICATE CO. v. N. Y. C. R. R. CO., 275 U. S. 179.

The essential issue presented in this proceeding may be stated as follows: Does the Interstate Commerce Commission possess jurisdiction, under the Interstate Commerce Act, to determine whether an international joint through rate, assessed upon shipments moving by rail from a point in Mexico to a United States destination, a domestic carrier being party to such through rate, has been unreasonable, in violation of Section 1 of the Act, and to order the United States carrier to pay as reparation the difference between the charges collected and those accruing under a rate deemed by the Commission to have been reasonable, *when it is affirmatively made to appear that the domestic carrier which transported the shipments from the boundary line to final destination has contemporaneously maintained a reasonable and lawful rate, applicable upon the traffic in question, from the point upon the boundary line at which the shipments entered to the destination within the United States?*

The issue thus presented does not relate to the powers of Congress, under the Constitution, to regulate commerce with foreign nations, but solely to the jurisdiction conferred upon the Commission, and now existing, by the terms of the Act. That question was directly passed upon by this Court, in

News Syndicate Co. v. N. Y. C. R. R. Co., et al. (1927), 275 U. S. 179; 72 L. ed. 225.

In the proceedings out of which that case arose, an international rate which had been assessed upon certain shipments moving from a point in Canada, via the Niagara frontier, to New York City was found by the Commission to have been unreasonable, and reparation was awarded. The case therefore resembles the instant proceeding quite closely; but there is one essential distinction which, in view of the express language of this Court in the opinion, becomes of the greatest importance: namely, that whereas in the *News Syndicate Case* the United States carriers, parties to the joint through rate, had failed to maintain or publish *any* rate whatsoever, reasonable or otherwise, from the international boundary line to New York City, *in the instant case respondent, the domestic carrier which handled petitioner's shipments from the international boundary line to San Francisco, has duly maintained a rate from the boundary line, applicable to the transportation service from that point to San Francisco, which was proved and found to be reasonable and lawful* (R. 41-42).

In its brief (pp. 5-7), as in the brief in support of its petition for a writ of certiorari (pp. 6-8), petitioner makes lengthy reference to certain questions which were certified to this Court in the *News Syndicate Case,* and to the categorical affirmative answers made to those questions; but for some unexplained reason it fails to quote and indeed utterly disregards the lengthy opinion which accompanies those answers, wherein this Court has undertaken to interpret and apply the pertinent provisions of the Act. Apparently petitioner believes that the unanimous opinion of this Court, whereby its replies to the certified questions are explained, is mere surplusage, entitled to no respect or regard whatsoever, and considers that the lower court, which quoted at length from that opinion and pointed out wherein its own decision rested thereon, has in that respect fallen into outright error.

In connection with its reply to the first question certified to it, this Court said (275 U. S., at pp. 186, 187):

> "The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. Section 1(1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1(5); Section 6(1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure.

Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. *Louisville & N. R. Co. v. Sloss-Sheffield Steel & I. Co.*, 269 U. S. 217, 231, 70 L. ed. 242, 249, 46 Sup. Ct. Rep. 73. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this Act for a violation thereof.' Section 16(1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted."

It is to be noted especially that this Court did not declare, or even indicate, that the publication and maintenance of the international joint through rate was a violation of the Act; it specifically stated that it was the carrier's "failure to establish rates covering the transportation from the international boundary" which "contravened the provisions of the Act", and caused the shipper to be damaged.

In discussing its reply to the second question, this Court said further (275 U. S., at pp. 187, 188):

> "The Commission did not specifically find whether the portions of the charges fairly attributable to transportation within the United States were excessive to the extent that the through rates were found unreasonable. While the findings seem to indicate that the Commission held the entire excess should be charged against the American lines, we shall consider the question on the basis therein stated. The Canadian lines furnishing the transportation from Thorold to the international boundary were not before the Commission and were not sued. The defendants in error participated in the making of the through rate and actually collected the excessive charges. By their failure to comply with the Act, plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, Section, 13(1), and had jurisdiction to make the order. Section 16(1). The question should be answered in the affirmative."

It will be observed that this Court again emphasized that the violation of the Act, out of which the damage arose, lay in the failure of the United States carriers to comply with their obligation under the Act to maintain a just and reasonable rate, or indeed *any* rate, applicable to that part of the transportation service which took place within the United States. If such a rate had been maintained, conforming to the require-

ments of the Act, then there would have been no violation of law with respect to which the Commission might award reparation. Of course, it is obvious (and indeed, both petitioner and Amicus Curiae apparently concede) that if there is no failure by the carrier to conform to the duty imposed by the Act, there is no offense to which the Commission's jurisdiction may attach, for the Commission is empowered to award damages only when they are occasioned by a violation of the Act, by carriers subject thereto.

It will be noted (R. 49, 50) that the lower court incorporated in its opinion most, if not all, of the excerpts from the opinion in the *News Syndicate Case* which are reproduced above. Its decision is predicated squarely upon the controlling pronouncements of this Court, and it has recognized the decision cited as defining fully the circumstances under which the Commission is empowered to award reparation for the collection by a United States carrier of charges based upon an international joint through rate. Particularly, the District Court has recognized that this Court has very clearly pointed out that the Commission's jurisdiction must be predicated upon a showing that the United States carrier has failed to fulfil its obligation, under the Act, to maintain a just and reasonable rate applicable to the transportation service performed within the United States; that when it affirmatively appears that that obligation has been discharged, there is no violation of law inherent in the

charging of an international joint through rate, whatever its relative level, and the Commission has no jurisdiction to award damages in the premises.

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2. THE RESPONDENT COMPLIED WITH ITS DUTY UNDER THE INTERSTATE COMMERCE ACT, AS CONSTRUED BY THIS COURT IN THE NEWS SYNDICATE CASE, IN THAT IT MAINTAINED A REASONABLE RATE APPLICABLE TO THAT PART OF THE TRANSPORTATION OF PETITIONER'S SHIPMENTS WHICH TOOK PLACE WITHIN THE UNITED STATES.

While our opponents apparently concede that the instant case is controlled by the principles laid down in the *News Syndicate Case,* they undertake to avoid the application of those principles. They argue that although a reasonable rate was maintained by respondent, applicable to the transportation of carload shipments of its commodity from the international boundary line at Nogales to San Francisco, such rate was not applicable to shipments moving from a point in Mexico under through bills of lading executed and issued at Navojoa by the Mexican carrier; that consequently respondent did not maintain any rate applicable to the transportation within the United States of the shipments in issue, and thus failed to comply with the duty laid upon it by the Act as interpreted in the *News Syndicate Case* (see Petitioner's Brief, pp. 7-9; Brief of Amicus Curiae, pp. 14, 23, 36-37).

The essence of our opponents' argument is simply that the publication, and filing with the Commission, of a tariff naming a joint through rate from Navojoa, via Nogales, to San Francisco made that rate *exclusively* applicable, and that the contemporaneous rate from Nogales to San Francisco, whether reasonable or not, could not have been applied to the transportation service within the United States, in lieu of the published through rate. Both petitioner and Amicus Curiae rely, in this behalf, upon this Court's decision in:

B. & O. S. W. R. R. Co. v. Settle (1922), 260 U. S. 166; 67 L. ed. 189.

In the *Settle Case* it was held that, *under the Interstate Commerce Act*, the publication of a rate between any two points (within the United States) makes such rate exclusively applicable, and prohibits the application of possible combinations of intermediate local rates for the purpose of defeating the published through rate. The doctrine of that case, however, applies only to transportation coming within the scope of the Act. Transportation from a point in an adjacent foreign country to a United States destination is not subject to the Act, except to the extent that the transportation takes place within the United States. By the very terms of Section 1, paragraphs 1, 2, the Act does not apply to that transportation service in its entirety, and cannot apply to the service performed upon the lines of the foreign carrier, prior to the arrival of the shipment at the boundary line.

The rule of the *Settle Case* is simply a rule of interpretation of the Act. Neither that rule, nor any other rule of interpretation of the Act, made either by the Courts or the Commission, can be extended beyond the boundary line, into the territory of an adjacent foreign country, so as to control transportation services there performed, compelling shippers there to use, and foreign carriers to observe, a joint through rate as the *only* rate applicable. No provision of the Act can be invoked to forbid a shipper from billing a shipment, intended to move to a United States destination, at the local rate to the boundary line, and thence rebilling at the domestic rate. Such methods would secure to the shipper the benefit of combinations upon the international boundary, as suggested by petitioner (Brief, p. 9); but there is nothing in the Act to forbid the practice. Certainly there can be no violation of the Act, if a United States carrier accepts, at the boundary line, a shipment which has been duly transported to that point, and carries it to its ultimate destination in the United States, under a reasonable and lawful domestic rate.

The fundamental fallacy of the argument predicated upon the *Settle Case* lies in the assumption that an international joint through rate is governed by and subject to all of the requirements of the Interstate Commerce Act. That assumption is wholly incorrect. International joint through rates of the character here involved are not subject to the requirements of the Act, or to the Commission's jurisdiction. For ex-

ample, the Commission has itself declared that it cannot require carriers subject to its jurisdiction to establish, or to continue to participate, in international through rates.

San Diego Chamber of Commerce v. A. & V. Ry. Co. (1925), 102 I. C. C. 27;
Elimination of Grand Trunk Railway From Certain Routes (1926), 115 I. C. C. 609;
Rates on Petroleum and Petroleum Products (1927), 128 I. C. C. 545;
Watab Paper Co. v. Canadian National Ry. Co. (1929), 152 I. C. C. 265, 268.

While such rates may not be required, there is no prohibition of law upon their establishment and continuance. They may be maintained and applied, even though not published in tariffs on file with the Commission. Under the provisions of the Commission's Tariff Circular 18-A, in effect in 1923 and 1924, the publication of international rates was *encouraged and permitted* by the Commission, *as a great convenience* to shippers and carriers; *but it was not obligatory.*

Tariff Circular 18-A; Rule 72:

"Tariffs to or from Points in Adjacent Foreign Countries (adopted November 22, 1909).—Through rate and fares from points in the United States to points in foreign countries adjacent thereto and through rates and fares from points in adjacent foreign countries to points in the United States are a great convenience, and the

Commission therefore desires to permit and encourage the publication and filing of such through rates and fares under lawful and proper conditions. Therefore, and until further order of the Commission:

"A joint tariff naming rates or fares from a point in the United States to a point in Mexico or in Canada; from a point in Mexico or in Canada to a point in the United States; from a point in Mexico through the United States to a point in Canada; from a point in Canada through the United States to a point in Mexico; from a point in Mexico through the United States to a point in Mexico; from a point in Canada through the United States to a point in Canada; from a point in the United States through Mexico or through Canada to a point in the United States, must be concurred in, in form prescribed in these regulations and without reservation by all lines that are parties to the through rates or fares and that participate in transportation thereunder; or, a statement of the divisions of the rates or fares accruing to the roads in the United States to or from the border must be incorporated in the tariff or be filed with the Commission together with and at the same time the tariff itself is filed.

(Adopted March 7, 1910.) *The purpose of the above rule, requiring the domestic carriers to publish their divisions of rates and fares to and from Canada or Mexico, is to give to this Commission definite information as to their lawful earnings, and is not intended as a means of exercising any jurisdiction over carriers in adjacent foreign countries.*" (Italics ours.)

Compare, also, the Commission's opinion in:

Publication of Rates Between United States and Canada (1928), 147 I. C. C. 778.

It will be noted that petitioner and Amicus Curiae do not assert, or even attempt to contend, that the rate from the international boundary at Nogales to San Francisco, contemporaneously maintained by respondent, was not reasonable and lawful, and otherwise in conformity with the Act, or that it could not have been applied to these shipments, if any circumstances existed such as to render the international through rate inapplicable. Their essential argument is simply that that domestic rate could not lawfully have been applied to these shipments, solely because the joint through rate was published and filed. This argument in its turn is predicated wholly upon the theory that the Act applies to and controls the entire transportation service, including the portions thereof performed in Mexico prior to the arrival of the shipments at the international boundary line. It must be apparent that our opponents' contentions simply beg the question, for the very issue to be determined is whether the Act is controlling in the premises. Under its own self-expressed limitations (Section 1, paragraphs 1, 2), the Act, and the Commission's jurisdiction thereunder, cannot extend beyond the international boundary line into a foreign sovereignty, so as to govern the conduct of services there performed. It necessarily follows that the scope of the Act could

not be contended so as to compel foreign shippers to observe, and foreign carriers to apply, a joint through rate, regardless of the possible existence of local rates whose application might result in lower charges or other advantages.

A complete and conclusive answer to our opponents' argument predicated upon the *Settle Case* is afforded by the opinion in the *News Syndicate Case*. In that opinion this Court pointed out, at least twice, that the shipper had been "compelled to pay charges based upon the through rates", because of the failure of the United States carriers "to comply with the Act", by establishing just and reasonable rates for the transportation service from the boundary line to the domestic destination. The necessary conclusion must be that, in the view of this Court, if reasonable domestic rates had been provided, the shipper would not have been compelled to pay the international through rates, but instead could have elected to have the domestic rates applied; that the latter would have been as properly and legally applicable as the international through rate, dependent upon the shipper's choice.

Petitioner asserts (Brief, p. 9) that if the domestic rate from Nogales to San Francisco is held to have been alternatively applicable, concurrently with the international through rate, to the shipments here involved, the central and controlling purpose of the Act will be defeated, in that there will be exceptions to the rule that there shall be only one rate for the simi-

lar carriage of freight, which rate must be charged. Reference is made to this Court's decisions in:

Armour Packing Co. v. U. S. (1908), 209 U. S. 56, 81; 52 L. ed. 687;

Boston & Maine R. Co. v. Hooker (1913), 233 U. S. 97, 110; 58 L. ed. 868;

L. & N. R. Co. v. Maxwell (1915), 237 U. S. 94, 97; 59 L. ed. 853.

This argument again depends upon the essential premise that the entire transportation service here considered is subject to the provisions of the Act. The Act does not control, or in any wise affect, the service performed prior to the arrival of the shipment at the international boundary line. Moreover, the cited cases related primarily to transportation between points in the United States, to which, of course, the Act applies. None of them involved transportation from a point in an adjacent foreign country, over an all-rail route, to a destination in the United States. Furthermore, they were all decided prior to 1920, and necessarily in the light of the statute as it existed at that time. In 1920 the Act was amended, so as to read as at present, providing expressly that it applies to the transportation of shipments from or to an adjacent foreign country, *only insofar as such transportation takes place within the United States.* The statute prior to 1920 contained no such proviso (36 Stat. L. 544); but the corresponding section now embodies that specific and definite limitation (41 Stat. L. 474; 49

U. S. Code, Section 1, paragraphs 1, 2). Petitioner and Amicus Curiae both seek to persuade this Court to disregard entirely the purpose and effect of the proviso added in 1920. But the rule of construction is that an important change in phraseology such as this must be given full effect. The deliberate selection of language differing from that used in the earlier Act indicates that a change of law was intended.

Brewster v. Gage (1930), 280 U. S. 327, 337;
74 L. ed. 457;
36 *Cyc.* 1165 (and cases cited).

In any event, refusal to extend the rule of the *Settle Case,* as a rule of interpretation of the Act, so as to control rates applied to transportation performed in part in Mexico, does not defeat the central purpose of the Act. It simply recognizes the statute's self-expressed limitations. Both the international rate, and the domestic rate from the boundary, were equally known and available to petitioner, for both were published in tariffs open to the public. If, for any reason, it was thought that the international rate was improper, and its avoidance desirable, petitioner could readily have caused the shipments to be billed from Navojoa to the boundary line at the local rate of the Mexican carrier, and thence rebilled to their United States destination at the applicable domestic rate. If the latter was thought legally objectionable, petitioner had the right to complain to the Commission, and upon a proper showing could be awarded reparation for its assessment.

We may emphasize again that petitioner did not allege, either before the Commission or subsequently in the trial court, that the local rate from the boundary line to San Francisco was unreasonable or otherwise unlawful. It did not even mention that rate in either of its complaints. That local rate was not only not alleged or proved to be unreasonable; the trial court directly found that it was reasonable and lawful for application upon shipments of petitioner's commodity (R., 42). That finding has not been assailed by petitioner at any stage of this case. A corresponding statement is found in the opinion of the Appellate Court (R., 50, 51), which is likewise not attacked by petitioner.

The conclusion necessarily follows that the respondent complied with its duty under the Act, is defined by this Court in the *News Syndicate Case,* in that it maintained a lawful and reasonable rate applicable to that part of the transportation service here involved which took place within the United States; that therefore no violation of law resulted from the charging of the international through rate, and no basis exists for the exercise of jurisdiction by the Commission.

3. RESPONDENT, HAVING COMPLIED WITH ITS DUTY UNDER THE ACT TO MAINTAIN A REASONABLE RATE APPLICABLE TO THE TRANSPORTATION SERVICE PERFORMED WITHIN THE UNITED STATES, COMMITTED NO VIOLATION IN COLLECTING CHARGES BASED UPON THE INTERNATIONAL THROUGH RATE.

At page 10 of its brief petitioner repeats the assertion, made in its opening statement, that the through charge applied and collected for the transportation service from Navojoa to San Francisco is "admitted to have been unreasonable". This assertion is erroneous, for no such admission has been made. On the contrary, respondent contends, and has consistently contended, that that rate was not unreasonable, either in fact or as a matter of law.

Under Section 1(5) of the Interstate Commerce Act all charges are required to be reasonable; but before it can be determined whether, legally speaking, a particular rate is reasonable as required by that provision, it must first be brought within the scope of the Act. Since the rate here in question is not required by the Act to be published, and is not, by the very terms of the statute, within the scope of the Act, it cannot in a legal sense have been unreasonable. An act cannot be characterized as in violation of a law, unless it is first shown that it is within the terms of that law. Compare:

A. T. & S. F. Ry. Co. v. Ariz. Grocery Co. (U. S. C. C. A., 9th, Mar. 23, 1931), ... F. (2d) .....

It is of no moment that petitioner's allegation of unreasonableness, contained in its complaint in the trial court, was not directly traversed. This is not a common-law suit for damages, wherein such issue could be litigated,* but a special statutory suit to enforce the award of the Commission. Respondent denied in its answer that the Commission possessed any jurisdiction in the premises (R., 9, 10), thereby in legal effect denying that the international rate was subject to the terms of the Act. It thus properly raised the issue whether that rate was, *as a matter of law,* unreasonable.

Petitioner's entire argument in this connection (Brief, pp. 10-11, 13-14), is directed to the proposition that the respondent violated Section 1 of the Act by failing to *charge* a reasonable rate for the transportation within the United States of the shipments in question. This contention is unsound, not only in that it depends upon the essential but fallacious premise that the through rate was unreasonable in a legal sense, but also because it assumes that it has been demonstrated, and that the Commission has found, that an unreasonable charge was made for the domestic transportation service performed. Neither of these premises can be sustained. We have already demonstrated that the first is erroneous; that since the Act did not extend to the entire transportation service, and did not cover the joint through rate, the latter could not

*It may be pertinent here to observe that the defendant contested the case on the merits before the Commission, after its motion to dismiss was denied (R., 3-5).

in a legal sense be in violation of the Act and therefore unreasonable. However, the second premise is equally without foundation. The Commission did not undertake to determine or find whether a reasonable charge had been made for the service rendered within the United States. There was neither allegation, proof, nor finding that petitioner had been charged an unreasonable amount for the service from the international boundary line (at Nogales, Ariz.) to San Francisco. In fact, the record completely fails to show what charge was made for that service, and no finding has ever been made with respect thereto, either by the trial court or by the Commission.

The record does, however, show and the trial court found (R., 41-42) that the respondent maintained, and held out to the shippers the opportunity to use, a reasonable local rate from the boundary. It thus fulfilled completely the duty laid upon it by the Act, as construed by this Court in the *News Syndicate Case*. The shippers elected not to accept that opportunity, although they might readily have avoided the asserted damage of which petitioner afterwards complained; they elected instead to have the shipments transported under the international through rate. If any damage was caused by the assessment of the latter, it was due entirely to the shippers' voluntary choice, and not to any failure by respondent to comply with its obligations under the Act.

Petitioner asserts, however (Brief, p. 10) that when a carrier has collected a rate which covers a service subject to the Act, there must be some practicable

method of determining whether that rate is reasonable. That general statement is no doubt substantially correct, but it cannot be applied in this case in the manner proposed by petitioner. At the risk of seeming repetition, we may emphasize again that petitioner did not allege, in either of its complaints, that it had been subjected to an unreasonable rate or charge for any service rendered which was controlled by and subject *in its entirety* to the Act. Petitioner attacked the through rate, as a whole, and made no complaint against the charge, if any, collected for and appertaining to the service performed within the United States. It likewise made no complaint against the rate from the boundary line to San Francisco.

Petitioner contends that the Commission must necessarily inquire into and determine the propriety of the joint through rate in its entirety; and this despite the fact that the Commission admittedly has no authority to require its publication in the first instance, or to oblige carriers parties thereto to continue it in effect. The practical difficulties, if the petitioner's proposition were followed, would be such as to nullify any effective exercise of jurisdiction by the Commission. If the Commission were permitted to inquire into and determine the reasonableness, as a matter of law, of international joint through rates, it would be necessary for it to consider transportation, traffic, and operating conditions, rate-comparisons, revenue statistics, and a multitude of other details appertaining to foreign carriers not subject to the provisions of the Act, or to

the jurisdiction of the Commission. Nor is there any economic or practical reason why any distinction should exist, as between shipments moving by rail and water from interior points in non-adjacent foreign countries to points in the interior of the United States,* and those moving by all-rail routes from interior points in Canada or Mexico to interior points in the United States. If jurisdiction resides in the Commission to consider the reasonableness of transportation charges for the one, it should equally extend to the other. The Court will appreciate the impractical and, in fact, impossible burdens which would be placed upon United States carriers, endeavoring to justify the reasonableness of all international joint through rates in which they might participate. Moreover the Commission, if it were to exercise such jurisdiction, would be required to extend its investigation far beyond the territorial limits of the United States, and to invade the sovereignty of friendly foreign nations, in order to be properly informed; for otherwise the Commission would necessarily have to proceed in the absence of proper information, and upon the basis of pure assumption.

Of course, the method of obviating these practical difficulties is fully indicated by this Court's decision in the *News Syndicate Case,* considered in the light of the statute as it now reads. The carrier's obligation under the Act is to maintain reasonable and

*Cf. *Boston Wool Trade Assn. v. A. T. & S. F. R. Co.* (1923), 83 I. C. C. 445.

lawful rates applicable to the transportation services performed within the United States, and to make reasonable and lawful charges for those services. If it fails to comply with that duty, then it may properly be held liable for any damages which result from that failure. But if it fulfills that obligation (and it is directly established, in this proceeding, that respondent has done so), then there is no violation to which the Commission's jurisdiction can attach, and consequently no legal damages can have been incurred which are susceptible of recognition by the Commission.

Petitioner would have the Court believe that the collection by a United States carrier of an international joint through rate would completely prevent the Commission from determining whether the charge made for the service rendered within the United States was reasonable. Somewhat similar arguments are offered by amicus curiae (Brief, pp. 26-27, 35-38). These contentions are as unsound as they are illogical. If such a joint through rate is applied, nothing exists to prohibit the shipper from complaining that the carrier has not maintained a proper and lawful rate, applicable to the service performed within the United States, and adducing proof to support that allegation. Necessarily, if the complaint is sustained, a violation of the Act will be established, and the shipper will be entitled to recover whatever damages are due. Under such circumstances, the Commission's jurisdiction under the Act, as interpreted

and applied in the *News Syndicate Case,* would not be diminished to the slightest degree.

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4. VARIOUS DECISIONS OF THE INTERSTATE COMMERCE COMMISSION CITED AND RELIED UPON BY PETITIONER AND AMICUS CURIAE ARE OF NO VALUE AS PRECEDENTS SUPPORTING THE EXERCISE OF THE JURISDICTION HERE ASSERTED.

At pages 12 and following of petitioner's brief, and pages 31 to 33 of the brief of Amicus Curiae, reference is made to various decisions of the Commission in which it has undertaken to award reparation for the collection of joint through international rates. It is asserted that the decision of the lower court denies to the Commission a jurisdiction which it has regularly exercised and asserted for more than twenty years. Four of the cases cited are said to have been decided subsequently to the *News Syndicate Case.*

It is obvious that the cases referred to which were decided prior to the *News Syndicate Case* are of no value as precedents, for they possess no more authoritative weight than the decision upon which the petitioner's suit is based. Moreover, it will be observed that many of them arose prior to 1920, at which time, as above stated, the Act was specifically amended so as to restrict its scope to that part of the transportation of international shipments to and from adjacent foreign countries which takes place within the United States.

It may be noted, moreover, that the Commission's decisions in this respect have neither been uniform nor unanimous, and that while the Commission from time to time has exercised this disputed jurisdiction, its express and primary purpose in so doing has been to obtain a final and authoritative ruling from the courts, defining the extent of its powers. Conflicting decisions have been rendered, and in many of the cases in which jurisdiction has been asserted, vigorous dissenting opinions have been registered. In at least one case cited by our opponents (*International Nickel Co. v. Director General,* 66 I. C. C. 627), it was expressly stated that the Commission desired that the matter be carried to the courts, in order that it might obtain proper guidance in future proceedings. In any event, however, extended discussion of these cases is unnecessary, for the controlling principles which apply have been fully laid down in the *News Syndicate Case,* and their applicability cannot be avoided by the multiplication of citations from the Commission's reports.

In certain of the decisions rendered subsequent to the *News Syndicate Case,* to which reference is made, the Commission has held that it may award reparation against international rates, regardless of the maintenance of rates applicable to the transportation service performed within the United States; and it has even undertaken to assert that that conclusion is based upon the principles laid down in the *News Syndicate Case.* Extended discussion of those decisions is like-

wise unnecessary. To the extent that the Commission has attempted to award reparation against alleged unreasonable international joint rates, regardless of the maintenance of rates applying to the domestic transportation service, the decisions are erroneous, and in direct conflict with the essential principle of the controlling decision of this Court. While the Commission's persistence in an erroneous construction and application of the Act, after it has been fully interpreted by this Court, may be somewhat surprising, it cannot prevail in opposition to the definite pronouncement of this Court, or be given weight as an authoritative interpretation of the statute.

> *U. S. v. Mo. Pac. R. Co.* (1929), 278 U. S. 269; 78 L. ed. 322 (and note the exhaustive annotation upon the topic of administrative construction of statutes, which accompanies the report of this case in Lawyers' Edition).

The inconsistency of the Commission's position that it may award reparation against international rates, although it expressly disclaims any power to require such rates to be published for future application or to prevent United States lines from withdrawing from participation therein, is particularly worthy of note. As this Court has indicated, there is no essential distinction, in legal or practical effect, between an order of the Commission awarding reparation for the past, and an order prescribing a reduced rate for the future. An order for the payment of reparation is

simply a retroactive prescription of the rate in question:

N. Y. C. R. R. Co. v. N. Y. & P. R. Co. (1926), 271 U. S. 124; 70 L. ed. 865;

and the findings inure to the benefit, not merely of the shipper directly concerned, but of the entire shipping public.

Phillips v. Grand Trunk Ry. Co. (1915), 236 U. S. 662, 665; 59 L. ed. 774;
Mitchell Coal Co. v. Pa. R. R. Co. (1913), 230 U. S. 247, 258; 57 L. ed. 1472.

If the Commission is empowered to award reparation for the charging, in the past, of an international joint through rate, where it affirmatively appears that the carrier has complied with its full duty under the Act, the Commission will be enabled to accomplish, *by indirection,* that which admittedly it cannot directly accomplish, thus violating the principle that an act which is directly prohibited is likewise prohibited to be done indirectly. *Quando aliquid prohibetur ex directo, prohibetur et per obliquum.*

Minn. Rate Cases (1912), 230 U. S. 352, 421; 57 L. ed. 1511, 1550;
N. Y. C. R. R. Co. v. N. Y. & P. R. Co., supra;
51 *Corpus Juris,* p. 114, Notes 55 and 56.

It is obnoxious to this essential principle, and indeed odious to every established idea of essential justice, that the Commission should be permitted to

exercise jurisdiction *indirectly* over the volume of international through rates, by means of successive reparation awards against the United States carriers only, although it is conceded both by the Commission and petitioner that the Commission lacks jurisdiction to accomplish such reductions prospectively, by mandatory rate-orders operating for the future only.

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5. AFFIRMANCE OF THE DECISION HERE UNDER REVIEW WILL NOT HAMPER THE EXERCISE BY THE INTERSTATE COMMERCE COMMISSION OF THE JURISDICTION, CONFERRED UPON IT BY LAW, TO CONTROL RATES AND CHARGES OF UNITED STATES CARRIERS PARTICIPATING IN TRAFFIC MOVING TO OR FROM ADJACENT FOREIGN COUNTRIES.

In the concluding subdivision of its brief (pp. 14-19), petitioner repeats the substance of the argument found at pages 13 to 16 of the brief submitted in support of its petition for a writ of certiorari, asserting that the decision of the Court below, if sustained, will operate to prevent the Commission from exercising any effective control over international through rates applied upon traffic to and from adjacent foreign countries. Various illustrations are offered which, so it is said, indicate the results which would follow. A similar contention is also advanced in the brief of Amicus Curiae (p. 27). Each of the illustrations cited by petitioner, and indeed, the entire argument of our opponents in this behalf, depends upon the er-

roneous view that the decision of the lower court declares that an international joint through rate is entirely free from the requirements of Section 1 (5) of the Act, and the conclusion, which petitioner draws from that erroneous assumption, that if that portion of the Act is not controlling, other sections are likewise without application.

The lower court did not reach the conclusion attributed to it by petitioner. It only declared that an international through rate is not within the requirements of the Act, when it affirmatively appears that the United States carrier, party thereto, has complied with its full duty under the Act, by publishing and maintaining a reasonable and otherwise lawful rate applicable to that part of the transportation service performed within the United States. The portion of the statute to which petitioner refers requires that all charges for services performed *which are subject to the Act* shall be just and reasonable; and, as the record in this case shows and the trial and lower appellate courts have directly found, that requirement has been complied with. Under the decision of this court in the *News Syndicate Case,* jurisdiction to consider whether the international rate was unreasonable could be exercised, *for the purpose of ascertaining damages,* only if it were first proved that the United States carrier had failed to comply with its duty under the Act, by publishing and maintaining a reasonable rate for the transportation within the United States. The

decision of the lower court simply declares, in effect, that since that obligation has been met in the instant case, the international through rate was not subject to review and retroactive reduction by the Commission.

Since all of the argument of our opponents in this connection depends upon this erroneous interpretation of the decision of the lower court, it is unnecessary to refer specifically to the various illustrations cited in petitioner's brief. However, we may again point out that the question here involved does not relate to the control which Congress *may* exercise, under its constitutional powers to regulate international commerce, but to the jurisdiction actually conferred upon the Commission by the Act.* That jurisdiction is

*Not *all* transportation services to and from adjacent foreign countries are subject to the Act, and to the Commission's jurisdiction. For example, the Commission has no jurisdiction whatever over commerce moving from a foreign country, via rail lines through the United States, to a foreign country:

Seymour v. M. L. & T. R. & S. Co. (1915), 35 I. C. C. 492;

Canales v. G. H. & S. A. Ry. Co. (1916), 37 I. C. C. 573;

Fernandez v. S. P. R. R. Co. of Mexico (1925), 104 I. C. C. 93.

Equally it has no jurisdiction with respect to the contract of carriage of a shipment from a non-adjacent foreign country to an inland point in the United States, up to the time the United States carrier receives the shipment:

Boston Wool Trade Assn. v. A. T. & S. F. R. Co. (1923), 83 I. C. C. 445.

limited by the express terms of the Act to the transportation service performed *within* the United States. If the failure of Congress to confer upon the Commission power to reach beyond the boundary of the United States, into the territory of an adjacent foreign country, results in impairing the effectiveness of its control over international commerce, that is a defect inherent in the statute itself. In other words, the entire argument in this connection is addressed, not to the correctness of the conclusions of this Court in the *News Syndicate Case,* and of the lower court in the instant case, regarding the meaning to be given to the statutory limitation, but entirely to the propriety of the enactment itself.

However, we do not anticipate any of the dire results which seem to frighten our opponents. The Commission's control over the participation of United States carriers in international commerce, under the circumstances suggested in petitioner's illustrations, can be just as effectively exercised, in every instance, if the carriers are required to publish and maintain rates and charges for the transportation service performed within the United States which conform to the requirements of the Act, and to hold out to interested shippers an opportunity to have such rates and charges applied. If, in addition, they publish and file, in conjunction with carriers operating beyond the boundaries, joint through rates and charges which are printed and made public *as a matter of convenience,* surely no harmful results can follow. In every

instance such participation must be subject to their duty, as defined by this Court in the *News Syndicate Case,* to maintain lawful rates applicable to that part of the transportation service which takes place within the United States, and to assess and collect reasonable and otherwise lawful charges for that service.

It must also be obvious that if the Commission is permitted to exercise extra-territorial powers, in the manner asserted by our opponents, without regard to the maintenance of lawful rates for the transportation within the United States, the inevitable tendency will be that United States carriers will withdraw from participation in and publication of international joint through rates, now published as a matter of convenience and for the information of interested shippers. Shippers and receivers of international traffic to or from adjacent foreign countries will thus be obliged to use combinations on the boundary lines, and will be without any reliable information, provided in tariffs of United States carriers, respecting the rates and charges applying to their shipments for the movement between the boundary line and the foreign origins or destinations.

Since petitioner has resorted to various illustrations for the purpose of indicating results which in its opinion may follow if the decision under review is sustained, we may be permitted to offer a corresponding illustration, showing the possibilities which might eventuate if the decision were reversed. As may be

seen by reference to a railroad map of the Dominion of Canada, a continuous line of railway extends from Halifax, Nova Scotia, via Quebec, Montreal, and Toronto, to Windsor, Ontario, and thence to Detroit. Suppose, for purposes of illustration, that a through rate of $2.00 per hundred pounds is published, from Halifax to Windsor, to which is added, for movement to Detroit, a local rate from the boundary line at Windsor of 5 cents per hundred pounds. For convenience, the carriers decide to eliminate the combination of the separately-named factors over the boundary, and to name an equivalent through one-figure rate of $2.05, out of which each carrier retains, as its proportion, the same amount as when the combination was in effect: i. e., $2.00 to the Canadian lines, and 5 cents to the United States carrier. If petitioner's theory of the Commission's jurisdiction is sustained, the Commission would be permitted to determine the reasonableness of the entire international through rate, regardless of the reasonableness of the local rate applying from the international boundary line to the point of delivery within the switching limits of Detroit, and to order the United States carrier to pay the entire amount of whatever reparation might be found due under that determination. Let us suppose the Commission undertakes to declare the through rate unreasonable, to the extent it exceeds $1.50, and to award damages equal to the difference. Such damages, assuming a carloading of 20 tons, would amount to $220.00 per car, all of which would be assessed against

the United States carrier, notwithstanding that its entire revenue, upon the basis of the assumed loading, would amount to only $20.00 per car. While the illustration is possibly extreme, it is not in any sense exaggerated or improbable. It demonstrates the essential injustice which could be accomplished, if the argument of our opponents were accepted.

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6. THE TRANSPORTATION OF PETITIONER'S SHIPMENTS WAS PERFORMED PURSUANT TO CONTRACTS ENTERED INTO BETWEEN THE MEXICAN CARRIER AND THE CONSIGNORS, WHICH CONTRACTS ARE BINDING UPON PETITIONER.

In our opening statement we have emphasized the fact that the transportation service accorded to petitioner's shipments was covered by shipping contracts duly entered into between the Mexican carrier and the shippers, evidenced by the bills of lading which were issued at the times and at the place the transportation commenced. These bills of lading are incorporated bodily in the record, as Exhibits A, C and D to respondent's answer to the complaint in the lower court, and are accompanied by the English translations (R. 10(a)-33). Each of these contracts specifically provides that the transportation service is subject to the (Mexican) classification and tariffs in force at the date of its issuance, and that all transportation service shall be subject to the laws and railway regulations, and to all the conditions provided in the docu-

ment (R. 11-19-27). Both by their terms, and by well-established principles of the law of contracts, these shipping contracts, which were duly executed in Mexico and in accordance with Mexican law, are to be interpreted according to the law of time and the place of contracting; and this is true even though they contemplated that delivery of the freight should be in another state or country.

Liverpool, etc. Co. v. Phoenix Ins. Co. (1889), 129 U. S. 397, 458; 32 L. ed. 788, 798;
Northern Pac. Ry. Co. v. Wall (1916), 241 U. S. 87, 91; 60 L. ed. 905, 907.

It is fully established, and definitely found as a fact by the trial court (R. 40), that the international through rate of $1.33, applied upon these shipments, was duly published in a tariff on file with the Department of Communications and Public Works of Mexico; and it is not disputed that that tariff was in effect at the times of the transportation services commenced. The contracts thus expressly provide that the freight charges due thereunder were to be computed according to the tariffs in effect upon the dates they were signed: i. e., the amount of the shippers' (or consignee's) liability for freight was to be determined with respect to the contemporaneously published rate of $1.33.

Although the petitioner was not directly a party to these contracts between the Mexican carrier and the shippers, it was named therein as consignee, and it

actually received the shipments upon their arrival at destination, and paid the charges thereon. By the express terms of the contracts (Clause 16: R., 16, 24, 32), petitioner, as consignee, by its acceptance of the freight, became liable for the full amount of the freight charges. As a party for whose benefit the contracts were made, the petitioner, by accepting their benefits, likewise became subject to their burdens, if by their terms they purported to impose any such burdens. This Court has repeatedly held that the acceptance, by a consignee, of goods transported under a shipping contract of this character obligates the consignee to pay the applicable freight charges in full.

L. & N. R. Co. v. U. S. (1925), 267 U. S. 395, 397; 69 L. ed. 678, 680;

L. & N. R. Co. v. Central Iron Co. (1924), 265 U. S. 59, 70; 68 L. ed. 900;

P. C. C. & St. L. R. Co. v. Fink (1919), 250 U. S. 557; 63 L. ed. 1151.

These contracts were not void, or subject to abrogation or modification by the Commission, because of any supposed inconsistency with the Interstate Commerce Act. The Commission, acting in accordance with the powers conferred by the Act, may abrogate, supplant, or modify transportation contracts between shippers and carriers only when they cover transportation services, or other subject matter, coming within the scope of the Act itself. As we have previously shown at length, the transportation service here in-

volved was not subject to the Act or to any jurisdiction of the Commission, except to the extent that it took place within the United States. It is hardly open to argument that the Commission, in undertaking to award reparation amounting to the difference between the charges assessed at the rate specified in the shipping contracts, and those which would have accrued under a rate retroactively deemed to have been reasonable, has in practical effect attempted to substitute the latter rate as the measure of the petitioner's contractual liability, and thus to abrogate, or at least to modify, one of the essential features of the contracts. It has undertaken to make this modification effective as to the entire transportation service, including that performed in Mexico as well as within the United States. It has not, however, undertaken to exercise any jurisdiction, either to abrogate or modify these contracts, insofar as they govern transportation services performed wholly within the United States. We may emphasize again that petitioner made no allegation or proof, either before the Commission or in Court, respecting the transportation service performed *within* the United States. The Commission made no findings in that regard, and did not attempt to limit the effect of its decision and order to that part of the transportation service. In short, if it be conceded—which it is not—that the Commission might modify these contracts, upon allegation and proof that any of the provisions thereof were inconsistent with or forbidden by the Act, it nevertheless

affirmatively appears that such action has not been called for by petitioner, nor attempted by the Commission.

These contracts may not be ignored unless they are illegal, as to which there is neither allegation or proof. On the contrary, they were valid and binding upon petitioner, and imposed a definite obligation. That obligation could not be varied or abrogated by the Commission, in the manner attempted by its order here involved, and the order is therefore invalid and unenforceable.

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7. FURTHER REPLY TO CERTAIN CONTENTIONS ADVANCED IN BRIEF OF AMICUS CURIAE.

The brief of Amicus Curiae undertakes to support generally the contentions of the petitioner, and is, in large measure, simply a paraphrase of petitioner's arguments. To a considerable extent, therefore, it demands no separate reply. However, certain contentions are advanced by amicus curiae indicating that its position upon the major issues differs somewhat from that of petitioner, and it will be our purpose to treat briefly therewith, in the discussion which follows.

Amicus Curiae asserts (Brief, pp. 14, 15) that in the proceeding before the Commission that tribunal did not decide, and was not called upon to decide, whether the domestic rate from Nogales to San Fran-

cisco was reasonable, because (a) that question was not at issue, and (b) the issue before the Commission was whether the charges collected under the joint through rate were unjust and unreasonable, and whether the petitioner was damaged. This assertion simply lends emphasis to the point, which we have previously stressed, that the Commission was not called upon to and did not determine whether the charges assessed and applied upon petitioner's shipments, with respect to that part of the transportation service which was within the United States, and thus within the Commission's jurisdiction under the Act, were unjust and unreasonable; and that no allegation, proof, or finding has even been made with respect to those charges.

At page 15 of its brief Amicus Curiae asserts that the lower court erred (1) in finding that the petitioner was not compelled by any act of the respondent to pay the joint through rate; and (2) in failing to find that the Commission had jurisdiction to determine that the joint through rate applicable to the shipments in question, was unreasonable. These two assignments of error constitute the fundamental propositions advanced by opponents. In our preceding discussion we have disposed of the first, for we have shown that the maintenance of a reasonable rate, covering that part of the transportation service performed within the United States, constituted a full compliance with the duty placed upon respondent by the Act as interpreted in the *News Syndicate Case,* and afforded to the ship-

pers an opportunity, if they had so elected, to avoid payment of the asserted unreasonable joint through rate by having their shipments transported either by rail or other means to the boundary line, and thence by rail, at the reasonable domestic rate of the respondent, from the boundary line to San Francisco. The second depends, of course, upon the establishment of the first; for obviously, as stated by this Court in the *News Syndicate Case,* unless respondent failed to comply with its duty under the Act, in such manner as to compel the petitioner to pay an unreasonable joint through rate, the Commission has no jurisdiction to consider the latter, even for purposes of awarding damages.

Amicus Curiae also says (Brief, p. 15) that the court below implied that under the Act shippers have a choice of rates, and asserts that there can be but one lawful rate applicable to particular commerce between particular points under the Act. As we have previously shown, in dealing with a substantially similar contention of petitioner, this argument simply begs the question, for it assumes that the entire transportation service here considered is subject to the Act. The Act applies, and can apply, only to that part of the service which is performed within the United States; it cannot extend beyond the boundaries of the United States into the territory of the adjacent foreign country, and compel shippers or carriers there to observe what is merely a rule of interpretation of the Act. Nor is it correct to say that the court below

implied that shippers have a choice of rates *under the Act*, i. e., within the United States. The court below made no such declaration, either express or implied. It recognized that the transportation service here considered was not, in its entirety, subject to the Act, and that consequently a rule of applicability, arising out of and founded upon the Act, is not controlling.

At page 23 of its brief, Amicus Curiae asserts that the respondent did not comply with the duty placed upon it by the Act, as interpreted in the *News Syndicate Case*, in that it did not publish or maintain a reasonable and lawful rate applicable to the transportation service, performed within the United States, of the shipments here involved. In making that contention Amicus Curiae simply challenges the direct findings, made upon undisputed evidence, by the trial court, and affirmed by the lower appellate court (R., 41-42, 47, 50). Both of those courts directly found that the respondent did publish and maintain a rate, applicable from the international boundary line to San Francisco, which was just and reasonable, and which was neither alleged, proved nor found to have been unreasonable by the Commission. As we have already pointed out repeatedly, that rate was applicable to petitioner's shipments, at its own election, and the joint through rate was applied instead, only because the shippers in Mexico chose to enter into contracts (which petitioner adopted) specifying that it should be applied (R., 39-40).

At pages 23 and following, Amicus Curiae asserts that despite the existence of a reasonable rate applicable to the transportation service within the United States, the respondent is not relieved of responsibility for failing to apply that rate, and for having applied and collected the alleged unreasonable joint through rate. This argument is predicated necessarily upon the assumption that the joint rate is subject in all respects to the jurisdiction of the Commission, regardless of the existence of the reasonable domestic rate, and that the Commission might, within its jurisdiction, determine whether the joint through rate was unreasonable. But under the decision of this Court in the *News Syndicate Case,* compliance by the carrier with its duty to publish a reasonable rate applicable to the transportation within the United States discharges its responsibility, and the Commission cannot consider whether the joint through rate is in fact unreasonable or not. Its jurisdiction can be so exercised only when it is proved, as an essential prerequisite, that a violation of the Act has been committed by the United States carrier. In short, the charging of the international through rate (whether considered unreasonable or otherwise) is not itself the tortious act to which the jurisdiction attaches; it is the failure of the United States carrier to comply with its duty under the Act which constitutes the tort, and creates the damage. The Commission's consideration of the international through rate, consequent upon proof of the tortious act, is merely for the purpose of ascertaining the damages thus occasioned.

We have already pointed out that the Commission's decision, rendered subsequent to the decision of this Court in the *News Syndicate Case,* are of no value as authorities, since they represent simply the persistent effort of the Commission to exercise jurisdiction despite the direct ruling made by this Court. These comments apply with equal force to the decision in:

Cyanamid, etc., from Niagara Falls (1929), 155 I. C. C. 488;

to which reference is made at pages 24 and 25 of the brief of Amicus Curiae. Moreover, it will be noted that in this case, as in various other cases, the opinion of the Commission was by no means unanimous, and although a majority concurred in the result, various reasons were assigned therefor, and at least two Commissioners dissented vigorously. It is of interest to note the statements made in the separate concurring opinion of Commissioner Eastman. Referring to this Court's decision in the *News Syndicate Case,* Commissioner Eastman said (155 I. C. C., at pp. 500, 501):

> "The court did not hold that we can award damages because of the unlawfulness of international rates under Section 1, which was the theory on which we had proceeded, but because of the breach of statutory duty involved in the failure to publish just and reasonable rates to or from the boundary. For this purpose we have jurisdiction to inquire, not into the lawfulness of

international rates, but into their inherent reasonableness.

"From this reasoning of the court I think that it is permissible to infer that *we are without jurisdiction over international rates as such, our only jurisdiction over international traffic being to see to it that the United States railroads publish lawful rates to or from the boundary for the portion of the transportation which is within this country, and to award damages because of any breach of this duty on their part.* Under this theory, United States railroads would be free to participate in joint international rates as they see fit, and such rates would not be subject to our tariff rules or to our regulation in any other respect. They could be used by shippers as alternatives to rates to or from the boundary, and our only jurisdiction would be to inquire into their inherent reasonableness for the purpose of ascertaining damages if shippers were compelled to pay them because of the absence of rates applicable solely to the transportation within the United States." (Emphasis ours).

At several places in its brief (pp. 26-27, 36, 37, 38) Amicus Curiae argues that affirmance of the decision of the lower court will be equivalent to a declaration that carriers subject to the Interstate Commerce Act will be relieved from the obligations imposed by the Act, by the mere form in which they elect to publish rates. Apparently it is thought that a carrier participating in international traffic may exact unreasonable rates for such transportation, and escape responsi-

bility merely by publishing a rate to or from the international boundary regardless whether that rate is actually applied. This argument depends upon the mistaken premise that the international through rate must be applied, in lieu of possible combinations on the boundary line, and that a shipper would have no alternative but to pay the supposed unreasonable international through rate. That premise is, of course, fallacious; for there is nothing in the Act to prevent a shipper, if he believes that a published international rate is unreasonable, from billing his shipments so as to avail himself of combinations upon the boundary line. If the rate applying to the transportation within the United States is unreasonable, it may be attacked by complaint to the Commission, which would have ample jurisdiction to award reparation and to prescribe a lower rate for the future. It may again be observed that, in the instant case, it has neither been alleged nor proved nor found that the charge made by the respondent for the transportation service performed within the United States, under the alleged international through rate, was not in fact reasonable and lawful in all respects.

At pages 27 to 29, and 34, of its brief, Amicus Curiae refers to the decision of this Court in

U. S. v. P. & A. R. & N. Co. (1913), 228 U. S. 87; 57 L. ed. 742,

and asserts in substance that that case sustains the exercise by the Commission of jurisdiction in the

premises, although an international transportation service is involved. An examination of the opinion indicates that it does not support the contention of Amicus Curiae. The portion of the opinion quoted at pages 28 and 29 of the brief was the court's reply to the contention there advanced that the laws of the United States could not be applied to control acts of a criminal nature, committed in conjunction with through transportation part of which was performed within the United States, since the law would thus be given extra-territorial effect in part. The court held that since the acts, if criminal, were committed in conjunction with transportation performed within the United States and thus within its jurisdiction, the United States might properly exercise control over the parties by whom the acts were done. But to apply the principle to the instant case, it must first be assumed that the respondent has committed a violation of law with respect to the international commerce here involved. That assumption is directly contrary to the established facts, and the undisputed findings of the trial and lower appellate courts; for it is here affirmatively shown that the respondent has not only not violated the law, but has complied with every requirement thereof, as laid down by this Court in its controlling decision in the *News Syndicate Case.* We may concede that if a violation were committed, upon which jurisdiction of the Commission might be predicated, such jurisdiction might be given extra-territorial effect, in that the Commission would be em-

powered to consider, *for the purpose of ascertaining damages,* whether the international through rate was unreasonable in its entirety. But such jurisdiction must depend upon a showing that the Act is violated with respect to the transportation service within the United States: a showing which is not only not made by the petitioner in the instant case, but is in fact affirmatively challenged by the direct proof made by the respondent, and the findings in response thereto made by the trial court.

Reference is made, at pages 29 to 30 of the brief, to decisions of this Court in

C. N. O. & T. P. R. R. Co. v. I. C. C. (1896), 162 U. S. 184; 40 L. ed. 935;

and

Ill. C. R. R. Co. v. I. C. C. (1907), 206 U. S. 411; 51 L. ed. 1128.

It will be observed that both of these cases involved transportation within the United States only, and that both arose prior to the amendment of the Interstate Commerce Act in 1920, whereby specific limitations were placed upon the scope of the Act as applied to transportation to and from adjacent foreign countries. Neither of these decisions can be considered as having any particular application to the case at bar.

The argument at pages 34 and 35 of the brief of Amicus Curiae is to the effect that the amendment of the Act, enacted in 1920, is of no especial significance, and creates no limitation which did not thereto-

fore exist. It is said that the Commission never had extra-territorial powers, regardless of the additional restrictive language, and is not required to exercise such powers in order to determine whether a carrier subject to the Act is liable, as a joint tort-feasor, for committing a wrong forbidden by the Act. We have already pointed out that, under the authorities, the deliberate selection of language differing from that in the preceding statute indicates that a change in the meaning and effect of the statute was intended, and that a material amendment therefore cannot properly be disregarded. Indeed, it is not at all unlikely that the amendment was enacted because of the Commission's conflicting views as to its jurisdiction over international traffic, and particularly its decisions asserting jurisdiction to award reparation against international rates, though it disclaims any power to prescribe such rates for the future. We may again emphasize, moreover, that the argument of Amicus Curiae in this connection, as indeed its entire argument throughout its brief, necessarily presupposes that the assessment and collection of an international through rate is, in and of itself, a violation of the Interstate Commerce Act, regardless of the maintenance of reasonable rates and the application of reasonable charges upon those portions of the service performed within the United States, and is thus squarely opposed to the essential principles of this Court's decision in the *News Syndicate Case.*

CONCLUSION.

The decision of the lower court is squarely in accord with the controlling pronouncement of this Court in the *News Syndicate Case*. The record demonstrates that the respondent has complied fully with the duty laid upon it by the Interstate Commerce Act, as interpreted by this Court in that opinion, and fails to show that any violation of the Act has been committed as a result of which petitioner has been damaged.

We ask the Court to approve and affirm the decision of the lower court.

Respectfully submitted,

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(APPENDIX FOLLOWS.)

Appendix.

Appendix.

STATUTES RELIED UPON.

Act to Regulate Commerce, Section 1, paragraph 1 (in effect prior to 1920: 36 Stat. L. 544):

"That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United

States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

Interstate Commerce Act, Section 1, paragraphs 1, 2 (in effect from and after 1920: 41 Stat. L. 474; 49 U. S. Code, Section 1, paragraphs 1, 2):

Sec. 1.

(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this Act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.